Feb 18 1870

Mr Hughes

Mr Hall

motion to dismiss

Mr. Justice Clifford

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 364.

THE UNITED STATES, APPELLANTS,

vs.

ASHER AYRES.

APPEAL FROM THE COURT OF CLAIMS.

Dismissed

Dec

FILED DECEMBER 11, 1869.

Jas Nelson

SUPREME COURT OF THE UNITED STATES.

No. 364.

THE UNITED STATES, APPELLANTS,

vs.

ASHER AYRES.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.—Filed Dec.* 1, 1866.

United States Court of Claims.

ASHER AYRES,
vs.
THE UNITED STATES. } No. 2545.

To the honorable Court of Claims:

The petition of Asher Ayres, a loyal citizen of the United States, resident in the State of Georgia, showeth—

That in the month of December, A. D. 1864, your petitioner was the owner and in possession of two hundred and nine (209) bales of cotton, of the aggregate weight of one hundred and five thousand one hundred and seventy-eight (105,178) pounds, then stored in the city of Savannah, in the State of Georgia; that about one month after the occupation of said city of Savannah by the United States forces, all of the said cotton was seized and taken possession of by the United States military forces, acting, as your petitioner is informed and believes, under the orders of Maj. Gen'l W. T. Sherman, then in command of the army of occupation, but without the consent of your petitioner, and against his will; that no part of the said cotton or its proceeds was appropriated in any way to the use of the army or navy of the United States, but the said cotton was turned over by the officers seizing it to an agent of the Treasury Department, by whom it was sold, and the net proceeds thereof have been paid into the treasury of the United States.

Your petitioner avers that he is unable to state the precise sum for which said cotton was sold, or the expenses attending its seizure, shipment, transportation, and sale; but he states, on information and belief, that the said cotton was sold by the agent of the Treasury Department for about one dollar and ten cents per pound, and that the expenses as aforesaid did not exceed ten cents per pound, and that the net
2 proceeds thereof which have been paid into the treasury amount to one dollar per pound, or the aggregate sum of one hundred and five thousand one hundred and seventy-eight dollars, ($105,178 00.)

Your petitioner further shows that his said cotton has never been abandoned or forfeited, or become liable to confiscation under any of the acts of Congress in that behalf made and provided; and that it was not liable to seizure or capture under the laws of nations or the rules and usages of war; that no proceedings for the purpose of condemning said cotton have ever been instituted in any court or before any tribunal.

Your petitioner avers that his property having been taken possession of by the United States government and appropriated by it, an implied contract has arisen to make your petitioner just compensation therefor, by paying him all that said cotton was reasonably worth at the time and place it was so taken from him as aforesaid.

And your petitioner shows that said cotton, at the time and place of its seizure, was worth one dollar per pound, or the aggregate sum of one hundred and five thousand one hundred and seventy-eight dollars, ($105,178 00,) which amount he is entitled to receive from the United States under the implied contract, as stated above.

Your petitioner further shows that if there has been a valid and lawful capture of said cotton, which he understands is asserted by the United States, he is nevertheless entitled to receive the net proceeds of it, amounting to the said sum of one hundred and five thousand one hundred and seventy-eight dollars, under the provisions of the fourth

section of the act of Congress approved March 12, 1863, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Your petitioner further shows that he has at all times borne true allegiance to the government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government. And he prays the judgment of this honorable court for the said sum of one hundred and five thousand one hundred and seventy-eight dollars, ($105,178 00.)

HUGHES, DENVER & PECK,
Claimant's Solicitors.

3 B M. Rhodes, being duly sworn, deposeth and saith that he is the agent of the claimant named in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

B. M. RHODES.

Sworn and subscribed to before me this 6th day of November, 1866.

W. H. HAYWARD,
Justice of the Peace.

STATE OF MARYLAND, *Baltimore City, sct:*

I hereby certify that William H. Hayward, esquire, before whom the annexed affidavit was made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof, I hereto set my hand and affix the seal of the superior court of Baltimore City, this 6th day of November, A. D. 1866.

[SEAL.] ALFRED MACE,
Clerk of the Superior Court of Baltimore City.

Claimant's address is 82 South street, Baltimore.

Claimant's solicitors: Hughes, Denver & Peck, 258 G st., Washington, D. C.

4 In the United States Court of Claims.—December term, A. D. 1866.

ASHER AYRES
vs.
THE UNITED STATES. } No. 2545.

And the said defendants, by their deputy solicitor, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of one hundred & five thousand one hundred & seventy-eight dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant

has at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

JOHN B. KERR,
Dep'ty Solicitor for the United States.

5 In the United States Court of Claims.—December term, A. D. 1868

ASHER AYRES
vs.
THE UNITED STATES. } No. 2545.

And the defendants by their Attorney General, come for a further plea to the petition of the claimant herein, say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents, therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," approved March 12, 1863.

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the government, and for the better defense of the treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney General.

6 In the Court of Claims.

ASHER AYRES
vs.
THE UNITED STATES. } No. 2545.

And now, to wit, 22d of March, A. D. 1869, the court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Asher Ayres, claimant, have and recover of and from the United States the sum of thirty-five thousand and eleven dollars sixty-eight cents, ($35,011\frac{68}{100}$.)

By the court.

7 In the Court of Claims.—Dec. term, 1868.

ASHER AYRES
vs.
THE UNITED STATES. } No. 2545.

To the Court of Claims:

The defendants hereby make application for the allowance of an appeal to the Supreme Court of the United States, from the judgment rendered in this action on the 22 March, 1869, in favor of the claimant, for the sum of thirty-five thousand and eleven dollars and sixty-eight cents, ($35,011\frac{68}{100}$.)

Dated June 1, 1869.

ROB'T S. HALE,
Special Counsel of Treasury Dep't.

T. LYLE DICKEY,
Ass't Att'y Gen'l.

Filed in clerk's office June 3, 1869.

At chambers.

Ordered, that the appeal prayed in the case of Asher Ayres vs. the United States, No. 2545, be allowed.

June 3, 1869.

JOS. CASEY,
Ch. J. C't of Claims.

8 *The finding of facts, and the conclusions of law on said facts, on which the court founded its opinion.*

This claim is preferred under the abandoned and captured property act of March 12th, 1863, and we find the ultimate facts to be—

1st. That the claimant, in December, 1864, was the bona-fide owner of two hundred and nine bales of upland cotton, stored in the city of Savannah, Georgia.

2d. That this same cotton was seized by the officers and agents of the United States and shipped to New York, and there sold; and that the net proceeds, amounting to the sum of thirty-five thousand and eleven dollars and sixty-eight cents, are now in the treasury of the United States.

3d. That the claimant has not transferred or assigned these proceeds, nor are they claimed by any other person.

4th. That from the commencement to the close of the rebellion, both in his general sentiments and conduct, the claimant has consistently adhered to the United States, and did not give intentional and voluntary aid or comfort to the rebellion, or to persons engaged therein, except as stated in the next finding.

9 5th. That the claimant resided in the town of Macon, in the State of Georgia, during the rebellion, and for many years prior to its commencement; that during the rebellion the claimant became a member of a military company of "home guards" in the town of Macon, which was organized to maintain order in the town, and for the protection of the inhabitants. In the summer of 1864, General Stoneman, in command of a detatchment of United States cavalry, penetrated into the interior of Georgia, and was approaching the town of Macon. There-

upon the confederate military commander of the post, by a military order, directed every able-bodied man, capable of bearing arms, to turn out and resist the approach and advance of the United States forces. Military patrols were sent out to scour the town, and compel every man capable of bearing arms to turn out. The company of "home guards" to which the claimant belonged came out as a company under these orders, and constituted a part of the military force engaged in resisting Stoneman's approach to Macon. No personal service of the military order was made upon him, nor was any direct threat made against his life, person, or property to compel him to march armed with the company. But he had knowledge of such order, and of the means taken to enforce it, and complied with it without direct compulsion, but reluctantly and unwillingly.

The cotton was purchased, with the exception of eleven bales, from persons residing within the insurrectionary territory, whose loyalty was not proved on the hearing.

The claim was preferred to this court on the 1st day of Dec., A. D. 1866, for the net proceeds as above stated.

Upon the facts so stated the court rendered a judgment in favor of claimant for the net proceeds in the amount stated.

In the Court of Claims.

ASHER AYRES
vs.
THE UNITED STATES. } No. 2545.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney General of the United States and of the special counsel of the Treasury Department for the allowance of an appeal, as filed in the clerk's office June 3d, 1869, and of the order of the Chief Justice of said court, at chambers, allowing the same, of the finding of facts, and the conclusions of law on said facts, on which the court founded its opinion.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this ninth day of December, A. D. 1869.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on record:) Court of Claims. No. 364. The United States, appellants, vs. Asher Ayres.

Filed 11th December, 1869.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1869.

No. 364.

THE UNITED STATES
vs.
ASHER AYRES. } Appeal from the Court of Claims.

MOTION BY APPELLEE TO DISMISS THE APPEAL.

Brief of the Appellee.

The motion is as follows:

"IN THE SUPREME COURT OF THE U. STATES.

DECEMBER TERM, 1870.

No. 364.

THE UNITED STATES
vs.
ASHER AYRES. } Appeal from the Court of Claims.

The defendant, by his counsel, moves that the appeal herein be dismissed, for the reason that since said appeal was taken, and while the same was (as it now is) pending in this Court, the appellant made application to the Court of Claims, under the statute of June 25th, 1868, for a new trial in the cause, which application is now pending and undetermined in said Court of Claims, a copy whereof, duly certified, is hereto annexed.

JAMES HUGHES,
Counsel for Asher Ayres.

Notice of the above motion is accepted, Jan. 31st, 1870.

ROB. S. HALE,
Sp'l Counsel, &c.

UNITED STATES COURT OF CLAIMS.

No. 2,545.

DECEMBER TERM, 1868.

ASHER AYRES vs. THE UNITED STATES.

AFFIDAVIT FOR MOTION TO OPEN JUDGMENT, ETC., AND MOTION TO OPEN JUDGMENT, ETC.

IN THE COURT OF CLAIMS.

December Term, 1868.

ASHER AYRES
vs.
THE UNITED STATES. } No. 2,545.

Affidavit for motion to open judgment, &c.—Filed by Robert S. Hale, October 12, 1869.

Robert S. Hale, being duly sworn, says that he is the special counsel charged with the defence of the above entitled cause; that in said cause judgment was rendered in this court on the 22d day of March, 1869, in favor of the claimant for the sum of $35,011.68; that on the 3d day of June, 1869, an application on behalf of the defence was duly filed for the allowance of an appeal therein, but that no return has yet been made to said appeal.

This deponent further says that, since the rendering of said judgment, deponent has discovered evidence in regard to the loyalty of the claimaut, Asher Ayres, which deponent believes to be material to said case, and to establish the giving of aid and comfort by said claimant to the late rebellion against the United States; that said evidence consists—

First, in a bond executed by Charles C. Sims, as principal, and Asher Ayes and William B. Carhart, as sureties, running to the Confederate States of America, in the penalty of $20,000, dated the 5th day of September, 1863, and reciting that the said Sims has been appointed to the office of Assistant Quartermaster, and conditioned for the faithful discharge of the duties of said office by the said Sims, in accounting for and paying over all money, property, &c., to which is appended an affidavit by said Ayres and Carhart, verifying their signatures, and justifying as to property.

Also, an article of agreement dated the day of , 1862, between Asher Ayres, of the one part, and Captain Richard M. Cuyler, on behalf of the Confederate States of America, of the other part, duly signed by the respective parties aforesaid; in and by which it is covenanted and agreed that, for and in consideration of the sum of $1,400, said Ayres agrees to lay all the bricks required for two furnaces, chimney, coreoven, and wall attached to said furnaces, in the Macon arsenal, and to furnish all mortar and sand necessary to complete the work, in the opinion of the engineer in charge of said work.

This deponent believes and has no doubt that the signatures to said bond, affidavit, and article of agreement are the genuine signatures of the said Asher Ayres, claimant, and that he will be able so to prove the same; and that the said Charles C. Sims served as such assistant quartermaster in the army of the Confederate States of America, so-called, in carrying on war against the United States, under and by means of the said official bond above named.

Deponent further says, that the existence of said bond and agreement was wholly unknown to this deponent, and as deponent believes, to each and all persons connected with the Treasury Department, or with the Government of the United States, up to the rendering of the judgment above named, and until since the adjournment of this Court in the month of June last; that the same has since been discovered by the diligent examination of a very large mass of papers and documents in the different Departments of the Government, in examining which clerks have been diligently employed for many months.

ROB. S. HALE.

Sworn before me October 12, 1869.

JOHN RANDOLPH,
Assistant Clerk Court of Claims

In the Court of Claims. December term, 1868.

Asher Ayres vs. *The United States.*

Motion to open judgment, &c.—Filed October 12, 1869.

DISTRICT OF COLUMBIA, *ss:*

The defendants, by Mr. Hale, special counsel, on the affidavit herewith filed, move to open the judgment heretofore rendered in this action, or to stay the payment of the same, and for a new trial in said action, on the ground that fraud, wrong, and injustice has been done to the United States in said action.

ROB. S. HALE,
Special Counsel, &c.

Court of Claims. Jan. 29, 1870.

Asher Ayres vs. *The United States.*

I, Sam'l H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the motion and affidavit filed by R. S. Hale,

special counsel of Treasury, to open the judgment rendered in the above entitled cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this twenty-ninth day of January, A. D. 1870.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims."

On the 25th of June, 1868, an Act of Congress was passed, the second section of which reads as follows:

SEC. 2. *And be it further enacted*, That said Court of Claims, at any time while any suit or claim is pending before or on appeal from said Court, or within two years next after the final disposition of any such suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said Court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

See 15th Stats. at Large, p. 75.

The case of Asher Ayres was decided in the Court of Claims and appealed to this Court by the United States.

Pending the appeal the United States made and filed the foregoing motion for a new trial in the Court of Claims. It is still pending in that Court.

The object of the present motion in this Court, to dismiss the appeal, is to obtain a judicial construction of the statute.

The appellee maintains that it was not intended by the statute that the appeal to the Supreme Court, and the motion for a new trial in the Court of Claims, should be concurrent remedies, to be prosecuted simultaneously, but that the United States is bound to elect, and that the election having been made, the Government is concluded by it, and this Court ousted of its jurisdiction, and that the cause is remitted to and retained in the Court of Claims.

In that Court, should the Government succeed on the motion for a new trial, the whole cause is re-opened on its merits, and from a second judgment either party may appeal; but should the Government fail, the United States cannot resort to their appeal from the first judgment. The motion for the new trial is not compulsory; it is elective, and the election is made at the peril of the party making the motion, and should the application for a new trial be refused, the Government is concluded by it.

If the United States do not choose to abide by their appeal and try the case on the record as it stands, it is competent for them to dismiss it, and a new resort to the Court of Claims, under the statute, is equivalent to an abandonment of the pending appeal by an emphatic act, and should be so construed and enforced. The object of the statute was simply to restore the case to the jurisdiction of the Court of Claims, notwithstanding the appeal, in case of newly discovered testimony, not to provide for concurrent jurisdiction in the two courts, the one appellate, the other original—a jurisdiction anomalous and incompatible in the nature of judicial proceedings.

If the appeal is to be prosecuted here, the judgment of the Court of Claims might be affirmed upon the record sent here, and afterwards paid; yet the Court of Claims, upon a new and different record, might reject the claim on its merits. What remedy would the United States then have? Is it contemplated by the act of Congress to recover back by suit money paid upon a judgment of the Supreme Court of the United States? This would be a species of statutory and judicial *postliminium*, altogether too refined and impracticable for the ordinary affairs of men.

It may be urged that the hearing of the appeal in this Court might be postponed until the other proceeding is determined. This is, in effect, to say that the appellate jurisdiction of this Court is suspended to await the action

of the Court of Claims. Does the appellate jurisdiction wait on the original jurisdiction? If so, the remedies are not concurrent, but co-existing and alternative, the appellate jurisdiction being subordinated to the original jurisdiction.

In this view the counsel for the Government might almost indefinitely, at least oppressively, delay the trial of a cause in this Court fairly lost by the United States in the Court below.

Suppose this cause were called in its regular order on the calendar in this Court, and the United States had no other reason to assign for a continuance than a state of affairs brought about by their own voluntary act—a motion for a new trial in the Court of Claims? Would this Court postpone the cause? If so, where would the jurisdiction and the cause really be? In the Court of Claims. It would then appear that the United States had appealed a cause to this Court before they were ready, and required the Court to wait not to perfect under its own order a record already made, but to admit the making of a new one.

The statute above referred to is to be strictly construed There is but one construction to relieve it from difficulty, nay from absurdity and injustice in its operation, and that is to throw the responsibility of electing between the appeal and the motion for a new trial on the Government.

JAMES HUGHES,
Counsel for Asher Ayres.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, *Appellants*,
vs.
ASHER AYRES. } No. 364.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL.

The claimant below sued in the Court of Claims, under the abandoned and captured property act, for the recovery of the proceeds of sundry bales of cotton, and judgment was rendered in his favor 22d March, 1869, for thirty-five thousand and eleven dollars and sixty-eight cents, ($35,011\frac{68}{100}$.)

On the 3d June, 1869, the defendants applied in the court below for the allowance of an appeal therein to this court, and the appeal was duly allowed. The record on appeal was filed in this court on the 11th December, 1869.

On the 12th October, 1869, the appellants moved in the court below, under the second section of the act of 25th June, 1868, (15 St. at L., 75,) for a new trial, on the ground of newly-discovered evidence; said motion being founded on the affidavit of Mr. Hale, special counsel, of which a copy is printed with the brief of the respondent on this motion. This motion has not yet been heard in the court below, having been delayed from time to time on the application of the claimant below, to enable him to file papers in opposition to the motion, which papers have not yet been filed.

On the 31st January, 1870, the respondent served notice of the motion in this court to dismiss the appeal, on the

ground that the motion for a new trial below is a waiver of the appeal, which is the motion now to be heard.

POINTS.

The Court of Claims having held that no appeal lay to this court from its judgments in the abandoned and captured property cases, the Congress, by the first section of the act of the 25th June, 1868, provided for the right of appeal by the United States from such judgments.

By the second section of the same act, it also provided for the granting of a new trial in said court, on the ground of newly discovered evidence, "at any time while any suit or claim is pending before, or on appeal from said court, or within two years next after the final disposition of any such suit or claim."

Under these two sections the appeal was taken, and the motion for a new trial subsequently made. The provision for the granting of a new trial by the court below, pending an appeal in this court, is new, and perbaps anomalous. But it is submitted, that it is within the power of the legislature to establish such practice, and that its establishment is not inconsistent with the pendency of the appeal here. The appellate jurisdiction of this court under the Constitution is "under such regulations" as Congress may make.

Although an appeal, irrespective of the statute, when perfected, transfers the cause to this court, and takes it out of the jurisdiction of the court below, it is certainly in the power of the legislature to provide that, pending the appeal, a qualified jurisdiction of the cause for the purpose of granting a new trial, and thereby preventing injustice, may remain in the court below. And this qualified jurisdiction is not inconsistent with the jurisdiction of this court on appeal for the determination of the cause on its merits.

A qualified jurisdiction is, for certain purposes, retained in the district courts, pending appeal to this court, by the 13th section of the prize act of 30th June, 1864. (13 Stat at L., p. 310.)

The two remedies given by the act of 25th June, 1868, are concurrent, both established for the promotion of justice; and the adoption of one remedy by the party aggrieved is not an abandonment of the other.

If, however, the two are to be deemed inconsistent, it is evident that it is the remedy sought in the court below which must give way to the other. This court is not to be ousted of its jurisdiction, regularly acquired, by an application for a remedy in the court below, which has already (if the remedies are inconsistent) been deprived of its jurisdiction by the appeal. If, therefore, the respondent is aggrieved by the double relief sought by the appellants, his remedy is to be sought by objection to the jurisdiction of the court below, and not to that of this court.

The practice under this act is yet unsettled; but it is submitted that the following would be the proper practice, where a motion is made in the court below for a new trial under the statute, after the taking of an appeal to this court:

The motion is to be first heard in the court below. If the motion is denied there, that is an end of the matter, and this court proceeds on the appeal, in the ordinary course. If the motion for a new trial should be granted there, the appellants should then move in this court to remand the record to the court below, to await their action on the new trial.

This avoids any clashing between the jurisdiction of the court below and that of this court, and appears to be in harmony with the provisions of the act, and analogous, as far as anything in this case can be analogous, to the general practice of the court.

The effect of the practice, as claimed by the respondent,